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In the Supreme Court of the United States

October Term, 1959

No. 43.

WILLIAM R. FORMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.*

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

1.

The Government's statement of the "question presented" (Br. 2) is incomplete and erroneous

The true question is in substance: when the Court of Appeals reversed the judgment of conviction and remanded for the entry of a judgment of acquittal on the ground that the evidence was insufficient to warrant submission of the case to the Jury, can the Government petition for and the Court of Appeals grant a new trial

because the case "might have been tried upon this alternative theory" projected by the Government, for the first time, in the petition for the new trial?

The true questions are presented at page 4 of Petitioner's former Brief.

In the Modification Opinion, the Court of Appeals said (R. 1937):

"The Government . . . says that as in the *Grunewald* case, the indictment here presented an alternative theory."

"It now appears to us that the case might have been tried upon this alternative theory"

In *Grunewald*, the alternative theory was submitted to the Jury. In the case at bar, the Government did not request submission of the alternative theory to the Jury and did not except to the theory embraced in the instructions as given.

The Court went on to say (R. 1937):

The ultimate question is, in a criminal case when a defendant has been tried on one theory and the judgment of conviction reversed for lack of evidence, can he be tried again on another theory (not presented to the Court in the first trial) without violating the Double Jeopardy Clause of the Fifth Amendment?

The Government states (Br. 7) that the "subsidiary conspiracy to conceal" instruction was held to be erroneous by the Court of Appeals and that both Petitioner

and the Government agreed that it had no place in the case. This is an erroneous statement. The Court of Appeals did not determine that the instructions, as given, were erroneous.

In the Original Opinion the Court of Appeals decided that it was error to submit the case to the Jury because there was no evidence of an express original agreement to continue to act in concert, etc.

In the Modification Opinion, the Court of Appeals only determined that the case might have been tried on the alleged alternative theory, projected for the first time, in the Government's petition for a new trial.

The accuracy of the instructions, as given, was not challenged in the Court of Appeals. On the contrary, the Government defended the instructions as given, contended that the instructions met the requirements of the Supreme Court's Decision in the *Grunewald* case, and only sought to establish that the evidence was sufficient to warrant conviction under the instructions as given.

At page 31 of the Government's Brief in the Court of Appeals, in the summary of the argument, it said:

"This case meets the requirements set forth by the United States Supreme Court in *Grunewald v. United States*."

At page 44 of its Brief in the Court of Appeals, it said:

"The Government believes that . . . it meets the requirements set forth by the Supreme Court in *Grunewald v. United States*."

At page 57 of the Government's Brief in the Court of Appeals, it said:

"The Court met the requirements set forth by the United States Supreme Court in *Grunewald v. United States*. . . . The instructions were lengthy and complete, and those pertaining particularly to the question of continuing conspiracy are set out in full in the Appendix, beginning at p. 2a."

Petitioner does not agree that the instructions as given were erroneous. The Petitioner requested those instructions and the Court gave them without objection or exception by the Government and with no request for any other instructions. Petitioner's only complaint in the Court of Appeals in this respect was that there was no evidence of the character found necessary in the *Grunewald* case to warrant submission of the case to the Jury.

3.

The Court of Appeals did not, as the Government asserts (Br. 8), determine

"that there was an actual subsidiary conspiracy to conceal."

The reference to the statement, at page 1929 of the Record, is taken out of context. This statement was made in the Original Opinion. The Court first reviewed the law as established by the decisions *prior* to the decision of this Court in *Grunewald* and as the Court construed those decisions and measured by its construction of the standards required by the *Krulewitch* case, it was of the opinion that there was evidence of an actual subsidiary conspiracy to conceal

The Court then went on to determine what kind of evidence was required to establish such a subsidiary conspiracy *after the Decision of the Supreme Court in Grunewald* and the standards to be applied to determine the sufficiency of the evidence. The Court went on to say (R. 1932):

"However, we possess an advantage here that the trial court did not have." (Referring to the Decision of this Court in *Grunewald*).

It then analyzed the elements that must be established to create a subsidiary conspiracy that would prolong the operation of the statute of limitations in criminal cases and *after such analysis of this Court's Decision*, concluded by saying:

"The policy that blocked the theory stated in *Krulewitch* blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury."

In summary, what the Court said was that, while it thought that the evidence might have been held sufficient to establish a subsidiary conspiracy to conceal *prior* to the decision of this Court in *Grunewald*, the evidence was insufficient when measured by the standards established by the Supreme Court's Decision in *Grunewald*. Under that standard, there had to be evidence of an

"express original agreement among the conspirators to continue to act in concert in order to cover up for their own self protection, traces of the crime after its commission."

Consequently, the statement that the Court of Appeals determined that there was evidence of an actual

"subsidiary conspiracy to conceal is without foundation, and erroneous.

I.

Re: Waiver of the Double Jeopardy Clause of the Fifth Amendment.

The Government contends (Br. 37) that Petitioner waived his constitutional protection against double jeopardy because:

- (a) Petitioner "generated the Trial Court's error by requesting the erroneous subsidiary conspiracy instruction";
- (b) He "moved for a new trial in the District Court";
- (c) He "appealed from his conviction."

The contention is unsound.

1.

Re: Request for Instructions.

It is inconceivable how a request for instructions, made by the defendant and given by the Court (whether right or wrong) for submission of defendant's theory of the case, can operate as a waiver of the protection of the Double Jeopardy Clause of the Fifth Amendment. No authority is cited in support of the contention and it is indefensible in principle.

The instructions requested and given by the Court were not erroneous. The Court of Appeals did not hold, in the Modification Opinion, that the instructions, as given (relating to the statute of limitations), were erroneous. The Court only determined that the case

"might have been submitted to the Jury on the alleged alternative theory" projected by the Government for the first time in its petition for a new trial.

The instructions, as given, were patterned after the decision in the *Grunewald* case and were in strict harmony therewith. They presented the case according to the defendant's theory. If the Government wanted the case submitted on another theory, it should have so requested. The Court of Appeals merely determined, in effect, that the case "might" have been submitted to the Jury on the Government's alleged alternative theory had it requested submission on that theory. The Court of Appeals did not reverse in the first instance by reason of any alleged erroneous instruction. It only reversed, and directed an acquittal, because there was no evidence warranting submission of the case to the Jury and that judgment of acquittal should have been entered in the District Court.

When the Court of Appeals spoke of submission on "an impermissible theory" in the Modification Opinion and in the subsequent Opinion on petition for rehearing, it had reference to the erroneous conclusion of the District Court that the evidence was sufficient for submission to the Jury under the theory of the *Krulewitch* and *Grunewald* cases because, under that theory, the evidence was insufficient. What was "impermissible," was the submission of the case to the Jury at all and *not the particular instructions relating to the application of the statute of limitations as given.*

Moreover, the Government did not, and could not, in the Court of Appeals assign error in the instructions as given and thereby become an appellant in a criminal case. It did not challenge the accuracy of the instructions so far as they were given. As elsewhere pointed out, the instructions as given in a criminal case, unexcepted to, become, so far as the Government is concerned, the law of the case and the test of the sufficiency of the evidence must be determined in accordance with the instructions as given. That is true as to the defendant and with greater force as to the Government.

2.

Re: Motion for a New Trial.

Petitioner did move for a new trial in the District Court, but it was prefaced by the statement (R. 101):

"In the event that the Court should deny the foregoing motions, (referring to renewal of motion for acquittal) defendant William R. Forman moves for an order setting aside the verdict and granting a new trial on the grounds:"

The renewal of the motion for judgment of acquittal was distinct from the motion for a new trial for errors in the trial. Petitioner did not, in connection with his motion for judgment of acquittal, seek a new trial. He sought only the entry of judgment of acquittal notwithstanding the verdict.

Under the Authorities, hereinafter discussed, the *contingent* motion for a new trial, to be considered only if the motion for judgment of acquittal was denied, does not operate as a waiver of the Petitioner's protection

under the Fifth Amendment. The Court has rejected the idea of an involuntary or unintentional waiver.

3.

Re: Appeal to the Court of Appeals.

In the CONCLUSION to the Brief in the Court of Appeals, Petitioner carefully segregated the relief to be granted in that Court in the event of reversal. The conclusion reads:

"The judgment should be reversed with directions to enter a judgment of acquittal, if reversal is based on *any one* of the Specifications of Error numbered I, II, III, IV, V and VII.

"If reversal is based on Specifications of Error numbered VI, VIII, IX and X, a new trial should be ordered."

The CONCLUSION clearly sought direction for the entry of judgment of acquittal in the event that reversal was based on the ground of lack of evidence to support the verdict. *It did not seek a new trial if that contention was sustained.*

The Court of Appeals did not pass upon or decide any error infecting the trial.

When the Court of Appeals determined that it was error to submit the case to the Jury for lack of evidence, the only direction it could lawfully make, was the entry of a judgment of acquittal.

No case is cited in which it was held that the Court of Appeals could direct a new trial under the conditions shown by the record in this case on the theory

of "waiver" of the constitutional protection against double jeopardy.

In *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, cited by the Government, the Court of Appeals reversed the judgment of conviction *only on the ground that error was committed in denying a motion to suppress evidence* (255 F. 2d 394). It was an error infecting the trial because it permitted the consideration of incompetent evidence. The reversal on that ground could only warrant direction for a new trial. It could not result in the direction of a judgment of acquittal. In the case at bar, the reversal was based on a ground which could only result in direction of a judgment of acquittal and not for error during the course of the trial.

Green v. United States, 355 U.S. 184, does not sustain the Government's contention. On the contrary, it supports Petitioner's contention that the appeal, under the conditions prevailing in this case, was not a waiver of the Double Jeopardy Clause of the Fifth Amendment. The Court said:

" 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of *voluntary knowing relinquishment of a right* . . . And as Mr. Justice Holmes observed, with regard to this same matter in *Kepner v. United States*, 195 U. S. 100, . . . 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.' . . .

"Mr. Justice Holmes . . . sharply denounced the notion of 'waiver' as indefensible."

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The effect of an appeal on the operation of the Double Jeopardy Clause of the Fifth Amendment depends upon the ground upon which the Appellate Court reverses the conviction. If the reversal is based upon errors infecting the trial, the Double Jeopardy Clause does not preclude the granting of a new trial because the effect of the decision is that there was no legal trial as a matter of law and consequently no former jeopardy.

But an appeal, *based upon the contention that the evidence was insufficient to submit the case to the Jury* and that the defendant was entitled to a judgment of acquittal, cannot be a waiver of the constitutional protection against being tried a second time. On the contrary, it recognizes and affirms that a valid trial has been had at which the defendant became entitled to and should have been granted judgment of acquittal.

No decision has held that an appeal resulting in *a reversal on that ground* constitutes waiver of the constitutional protection against another trial *unless the defendant specifically requested a new trial upon reversal on that ground*. It is only when there is such an affirmative request for a new trial that waiver of the constitutional protection can be imputed.

In the *Green* case, the Court rejected the contention that an appeal by defendant from a judgment of conviction in and of itself operates as a waiver of the Double Jeopardy Clause of the Fifth Amendment. The Court called attention to Justice Holmes' characterization of such a contention as "indefensible" (p. 196) and to Justice McKenna's statement that the exercise of the

right of appeal does not "forfeit . . . great and constitutional rights."

In *Bryan v. United States*, 338 U.S. 552, cited by the Government, the *defendant sought a new trial* or a judgment of acquittal in the alternative. It was this specific request that was construed as a waiver of the Double Jeopardy Clause of the Fifth Amendment.

In *Ball v. United States*, 163 U.S. 662, cited by the Government, the appealing *defendants* sought a writ of error in which they *prayed*

"that the judgment be reversed and the case remanded for a new trial."

The judgment of conviction was *reversed because the indictment was held to be insufficient*, with directions to quash the indictment "and to take such further proceedings in relation to them as to justice might appertain."

In that case, it was the *defendants* who *sought a new trial*. The defendants' prayer for a new trial constituted the waiver of the Double Jeopardy Clause of the Fifth Amendment. It was *not* a case in which *the Government* seeks a new trial after the Court has concluded that the defendant was entitled to a judgment of acquittal. In the *Ball* case, the Court, in reversing the first conviction, did not do so on the ground that the defendants were entitled to a judgment of acquittal by reason of the insufficiency of the evidence.

The value of the *Ball* case as authority has been greatly impaired, if not dissipated, by the decision in the *Green* case, *supra*.

In none of the cases cited, did the Court of Appeals remand for a new trial so that the Government could have a new trial *on its motion* to enable it to try defendant on an "alternative theory" which it did not request in the first trial.

It is now well established that there can be no "waiver" of a constitutional protection unless the waiver is made "knowingly" and "intentionally" (*Green case*).

Waiver of the constitutional protection cannot be "inferred." "Every reasonable presumption is against the waiver of a fundamental right" and constitutional rights must be "jealously and vigilantly guarded."

Emspak v. United States, 349 U.S. at 198;

Smith v. United States, 337 U.S. at 150;

Glasser v. United States, 315 U.S. at 70;

Johnson v. Zerbst, 304 U.S. at 464.

In *Himmelfarb v. United States*, 175 F. 2d 924, at 931 (9th Cir.), on the authority of some of the above cited cases and others, the Court held:

"A waiver involves the *intentional* relinquishment or abandonment of a known right or privilege. A *strong presumption is raised against the waiver* of fundamental rights by an accused. *His constitutional rights are jealously and vigilantly guarded.*" (Emphasis supplied).

In the case at bar, Petitioner took every precaution to prevent the motion for a new trial and the appeal from being construed as a waiver of his constitutional right to protection under the Double Jeopardy Clause of the Fifth Amendment.

The only case which seems to have squarely presented the question now before the Court is *Karn v.*

United States, 158 F. 2d 568 (9th Cir.), cited in Petitioner's former Brief, p. 26, and pertinent quotation made therefrom. We respectfully submit that the case should be followed, and the conclusion reached by the Court of Appeals, of the Ninth Circuit, should be confirmed by this Court. The reasoning of the Court is unexceptional and it is evident that the decision was rendered after an exhaustive review of many cases in this and other Courts. (See cases cited in footnote 2, p. 573).

The decision in the *Karn* case was influenced in large part by the decision of the Court of Appeals of the Seventh Circuit in *Ex Parte United States*, 101 F. 2d 870, which was affirmed by this Court, in an equally divided Per Curriam Opinion (308 U.S. 519). We cited the case of *Ex Parte United States* (pp. 32 and 33 of Petitioner's former Brief). In that case, the District Court entered a judgment dismissing the indictment after the verdict of guilty was rendered, on a motion for judgment notwithstanding the verdict. The Government moved for an amendment of the judgment so that it would provide for a new trial instead of a dismissal of the indictment. The District Court denied this application and a writ of mandamus was sought to compel such modification.

While that case involved the power of the District Court to entertain the Government's motion for a new trial and not the power of the Court of Appeals, the case did involve the important question of the duty of the District Court when confronted with a case in which the evidence was insufficient to support a verdict. The

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conclusion was reached that it was the duty, under such circumstances, to direct an acquittal and not discretionary to order a new trial.

The decision of the Court of Appeals of the Ninth Circuit in the *Karn* case has not been impaired by any subsequent decision of that or any other Court.

In the *Sapir* case the question was presented but the per curiam opinion merely held that the original opinion was correct and did not pass upon the question of double jeopardy. Justice Douglas' concurring opinion, however, supports petitioner's contention that when the reversal is on the ground that it was error to submit the case to the jury, a new trial cannot be directed without violating the double jeopardy clause of the fifth amendment.

II.

Re: Construction and Application of Section 2106 of Title 28, U.S.C.A.

In *Kotteakos v. United States*, 328 U.S. 750, at pages 763 and 764, the Court, in construing Section 269 of the Judicial Code (harmless error statute), recognized that a different construction must be given to the statute in *criminal* cases than in civil cases; that when applied in criminal cases, it must not be construed so as to permit "*departure from a constitutional form*" and that it

"did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability."

Section 2106, Title 28, U.S.C.A., in so far as it may

confer discretionary power on the Appellate Courts, is of the same general character as Section 269 of the Judicial Code construed in the *Kotteakos* case and likewise, *must not be construed to permit a "departure from a constitutional norm."*

The Government contends that there is, in fact, evidence in the record supporting the alleged alternative theory and by reason thereof, the defendant was not entitled to judgment of acquittal in the District Court. Assuming the existence of such evidence to support the alleged alternative theory, it only supports the view that the Government could have requested submission of the case to the Jury on that alternative theory in the first trial. It does not follow that it is entitled to try defendant again on the alleged alternative theory. It wants another trial so that it can do what it failed to do in the District Court in the first trial.

Under the circumstances of this case, it is neither "just" nor "appropriate" that the Government should be granted a new trial on its petition so that the case could be tried over again on the alleged alternative theory. If Section 2106 of Title 28, U.S.C.A., is construed to permit this to be done, then it would be void as in conflict with the Double Jeopardy Clause of the Fifth Amendment because it would enable the Government to *try the defendant piece-meal* for the same offense. The Government would be entitled to as many trials as there are theories upon which a conviction could be obtained. It would enable the Government to split up the single offense and indict and try the defendant on one theory and when defeated in the trial or Appellate Court, it

could indict and try him on another theory for the same offense and so on without end.

III.

*Re: Contention That the Case Could Have
Been Tried on "One or Both of Two
Independent Theories."*

The Government argues (Br. pp. 20 to 22) that it "could, conceivably, have sought to meet this burden by proceeding on one or both of the two independent theories as to the nature of the conspiracy."

It then discusses one theory, denominated as the "*Beacon Brass* theory," and the other, as the "*Grunewald* theory," and says that the case was presented on one only of the two theories, to-wit: "*Beacon Brass* theory."

The record discloses that the case was not submitted to the Jury on any so-called *Beacon Brass* theory. It was submitted to the Jury on the principles of law governing the application of the statute of limitations in *conspiracy cases* as laid down in the *Grunewald case*. The Government defended in the Court of Appeals the instruction as given and insisted that the instructions conformed to the requirements established in *Grunewald*. See Government's contentions set forth in its Brief in the Court of Appeals quoted at pages 3-4 of this brief.

The Government only argued that there was evidence sufficient for submission to the Jury under the *Grunewald* theory embraced in the instructions. This contention was rejected by the Court of Appeals

in its Original Opinion and it did not reverse that conclusion on the Government's petition for a new trial.

• Notwithstanding its expres. reliance on the *Grune-wald* theory, it then says it "has no place whatever in this case" (Br. 21).

Assuming, without admitting, that the case could have been submitted on the two alleged theories, the fact remains, and it is conceded, that the case was tried on one theory only. The Government conceded that it did not seek submission of the case on the alleged alternative theory. (Petition for a new trial, printed as an appendix to the brief in opposition to the petition for writ of certiorari at page 17). The Government did not request submission of that theory to the Jury and it was not assigned as error in the Court of Appeals in its brief or oral argument.

The constitutional protection against double jeopardy requires that a defendant in a criminal case should be tried on all available theories in one trial. It cannot split up a single offense into a number of theories and try the defendant in separate trials on each of the available theories. The Government cannot try the defendant on one theory and, when defeated, seek an opportunity to try him again on another theory.

In *Abbate v. United States*, 359 U. S. 187, 79 S. Ct. 666, and in *Hoag v. State of New Jersey*, 356 U.S. 464, the view was expressed by Members of the Court that when a single act or transaction violates several criminal provisions, each constituting a separate offense, the defendant *must be tried* for all of the criminal offenses

arising out of the one act or transaction in a single trial and to try him in separate trials for each separate offense arising out of a single act, would violate the Double Jeopardy Clause of the Fifth Amendment.

In the *Abbate* case, Justice Brennan said:

"The accused, although punished separately and cumulatively for various aspects of a single transaction, is *subject to only one prosecution and one trial.*" (Emphasis supplied).

In the *Hoag* case, the Court said:

"But even if it was constitutionally permissible for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery *at a different trial.*" (Emphasis supplied).

This principle applies with greater force in the case at bar where the act or transaction gives rise to only one criminal offense under one statute and a second trial is sought so that the defendant could be tried on another or alternative theory.

It is now well settled that on appeal, neither the appellant nor the appellee can rely upon a theory not presented in the Trial Court either for reversal or affirmance of the judgment. This principal has been stated in various ways.

Johnson v. United States, 318 U.S. 189 at 201, the Court held:

"We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that

the course which he rejected at the trial be reopened to him. . . .

"The Court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.' *United States v. Manton*, *supra*, 107 F. 2d page 847."

In the cited case, the *defendant* was held bound by the rules therein set forth. There is no apparent reason why the Government should not be bound thereby. Indeed, the Double Jeopardy Clause of the Fifth Amendment and the law which denies the right to seek a new trial and the right of appeal in criminal cases, makes it mandatory to hold the Government to these rules.

In *United States v. Waechter*, 195 F. 2d 963 (9th Cir.), the Court held:

"We agree that the government, whatever may be the strength of its present argument, cannot fairly urge as a ground for reversal a theory which it did not present while the case was before the trial court."

In 3 Am. Jur., Title: Appeal and Error, page 35, Section 253, the text says:

"It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review." (Citing many U.S. Supreme Court Cases).

In *Indiviglio v. United States*, 249 F. 2d 549 (5th Cir.), the Court held:

"These principles are axiomatic and have, through the ages, guided courts of every rank and jurisdiction: 'The general rule * * * is that an

appellate court will consider only such questions as were raised and reserved in lower court. It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review

* * * * *

"We are without power to grant appellants more than they requested of the court below, or to grant relief upon a different theory from that advanced in the court below and before us."

Other cases stating these rules in the same or similar language are:

Inman-Poulsen Lumber Co. v. Commissioner,
219 F. 2d 159 (9th Cir.);

Fanchon & Marco, Inc. v. Paramount Pictures,
215 F. 2d 167 (9th Cir.);

Valley Shoe Corporation v. Stout, 98 F. 2d 514
(8th Cir.);

Dougall v. Spokane P. & S. Ry. Co., 207 F. 2d
843 (9th Cir.);

Kirk v. St. Joseph Stock Yards Co., 206 F. 2d
283 (8th Cir.).

These principles apply with greater force in *criminal* cases because the Government cannot, in a criminal case, become an appellant, assign error, or seek a new trial on any ground.

It is also well established that the instructions, as given, unexcepted to, *become the law of the case* and that the Appellate Court, in determining whether evidence was sufficient to sustain a verdict, must test the sufficiency by the law as embraced in the instructions.

In *National Surety Corp. v. City of Excelsior Springs*, 123 F. 2d 573 (8th Cir.) the Court held:

"These instructions, not having been excepted to by either party, became the *law of the case*, and in determining whether the evidence was sufficient to sustain a verdict for plaintiff, we must test its sufficiency by the law as announced therein." (Emphasis supplied).

In *Carter Carburetor Corp. v. Riley*, 186 F.2d 148 (8th Cir.) the Court held:

"The court's instructions, not being excepted to by either party, became the *law of the case* and we must determine the question of the sufficiency of the evidence by the law as so announced." (Emphasis supplied).

In 53 Am. Jur., Section 626, Title: Trial, page 488, the text says:

"However, where the court instructs upon the issues raised by the pleadings and justified by the evidence, its failure to instruct on all theories which may be drawn from the evidence introduced is not error, in the absence of requests for such instructions."

* * * * *

at page 620, Section 844, it says:

"An instruction not objected or excepted to is not before the appellate court for review, but must for the purposes of the case be *taken as the law*. Right or wrong, the instruction becomes the law of the case and is binding upon the jury, except where they are judges of the law, as well as on the court and counsel. The rule applies where the sufficiency of the evidence is sought to be challenged on motion for a new trial. . . .

* * * * *

"The instructions are the *law of the case*, and bind the jury even though they may be erroneous."

This rule applies with greater force in criminal cases

under the principle expressed in *Green v. United States*, 355 U.S. 184, as follows:

"Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States v. Ball*, 163 U.S. 662; *Peters v. Hobby*, 349 U.S. 331."

As a predicate for the availability of the alleged alternative theory, the Government argues that the instructions as given were erroneous notwithstanding the fact that the Government was the appellee, and not appellant, and notwithstanding the fact that it did not object or except to the instructions, as given, and made no request to give other or additional instructions. We submit that the Government could not lawfully urge such errors in the Court of Appeals and seek a new trial based thereon for it is well settled that errors in instructions, not excepted to, cannot be reviewed (Rule 30, Federal Rules of Criminal Procedure) and, particularly so, when urged by the appellee and not by the appellant.

In *Humes v. United States*, 170 U.S. 210, 18 S. Ct. 602, the Court held:

"We cannot regard as error the omission of the court to give instructions which were not asked. In *Isaacs v. U. S.*, 159 U.S. 487, 491, 16 Sup. Ct. 51, Mr. Justice Brown said: 'It is no ground for reversal that the court omitted to give instructions, where they were not requested by the defendant. . . . Nor are the instructions which were given, but not excepted to, subject to review.' (Cases)."

In *Holliday v. Great Atlantic & Pacific Tea Company*, 256 F. 2d 297 (8th Cir.), the Court held:

"This is an appellate court and before we can properly say that the trial court was in error that court must have been given an opportunity to pass upon the question. Alleged errors cannot for the first time be urged in this court."

In *Coler v. United States*, 256 F. 2d 221 (8th Cir.) the Court held:

"No objections were made and no exceptions taken to the charge of the court in this regard, and nowhere in the record have we been able to find that what we are now asked to decide was specifically called to the attention of, or ruled upon by, the trial court. The function of this Court is to review only rulings made by a trial court on questions brought to its attention and passed upon by it. *Ayers v. United States*, 8 Cir., 58 F. 2d 607, 608."

IV.

Re: So-Called Beacon Brass Theory.

The so-called "*Beacon Brass* theory" is an after-thought. It was conceived and projected, for the first time, with the filing of the petition for a new trial after the Court of Appeals had reversed the conviction with directions to enter a judgment of acquittal.

The *Beacon Brass* case did not decide any issues involved in this case. It was not a conspiracy case and the Court did not pass upon the question of the application of the statute of limitations in conspiracy cases. The Court did not, in that case, decide that a single offense of attempt to evade the tax in a single tax year could be split up into several offenses, each predicated on a different theory, and subject the defendant to several trials, each one on a different theory.

As was pointed out in the former brief, the Supreme Court held that it was without jurisdiction to consider the question of the application of the statute of limitations because the indictment did not allege the filing of the false income tax return prior to the making of the alleged false statements.

In the recent case of *United States v. Bridell*, Case No. 58, C. R. 475, United States District Court for the Northern District of Illinois, Eastern Division, Decision by Judge William J. Campbell, rendered November 20, 1958 (unreported), the Court held that the *Beacon Brass* case was not applicable to a case which, in essential particulars, was the same as the case at bar.

Pertinent portions of the Opinion are printed in the Appendix, pages 48 to 55.

The facts were as follows:

On March 14, 1952, defendant filed an individual tax return for the tax year 1951 in which he falsely reported \$6,008.00 income from American Carbon Paper Corporation. On June 13, 1952, as President of the Corporation, he caused to be filed a corporate tax return which falsely reported payment to him of the said \$6,008.00.

The prosecution was commenced June 13, 1958.

The indictment alleged that the false corporate return was filed "for the purpose of concealing additional unreported income," received by him in the year 1951.

Defendant moved to dismiss the indictment on the ground that the prosecution was barred by the statute of limitations on the theory that the "attempt" to evade

was complete upon the filing of the individual return on March 14, 1952; that the statute of limitations commenced to run from that date; that the subsequent filing of the corporate return (assuming that it was "for the purpose of concealing the said unreported additional income") was merely an "*aggravation of the offense already committed and not a separate offense which would start the running of the statute of limitations.*"

The Government contended (as it does in the case at bar) that the subsequent filing of the corporate return by the defendant constituted a *separate offense* because it was for the purpose of concealing that the individual return did not report all of the income and that the statute of limitations therefore commenced to run from the filing of the corporate return.

The Government relied on the decision in the *Beacon Brass case*.

The Court rejected the Government's contention and held:

- (a) that the *Beacon Brass Decision* did not adjudicate that the false statements, described in the indictment in that case, constitute a separate offense of attempted tax evasion from the offense involved in the filing of the false tax return;
- (b) that the *Beacon Brass Decision* did not adjudicate the application of the statute of limitations because the Supreme Court held that it had no jurisdiction to consider the question since the indictment did not allege the filing of the false return and, consequently, the *Beacon Brass Case* was not authority for the Government's position:

- (c) that the case of *United States v. Sclafani*, 126 F. Supp. 654, was not authority for the Government's position because it was decided upon the erroneous conclusion that the *Beacon Brass Case* adjudicated these issues.

The Court held that the offense of attempted tax evasion was complete upon the filing of the false individual return; that the later filing of the corporate return by the defendant for the *purpose of concealing* the unreported income, *was not a separate offense*, but was merely an *aggravation of the offense already committed*, that the statute of limitations *commenced to run from the date of the filing of the individual tax return*, and being more than six years prior to the indictment, the indictment was dismissed.

It is highly significant that the Government did not appeal from this decision because the Government has been consistently urging the *Beacon Brass Case* as authority for the proposition that separate offenses can be carved out of the attempt to evade the tax liability for a single tax year; by predicated prosecution on different acts of attempted evasion committed at different times and thereby prolong the statute of limitations.

In the case at bar, the record establishes that Seijas filed a false individual return in March of 1946 and the subsequent acts committed by him (assuming they were established by evidence), were merely acts of concealment of the offense already committed and, under the decision in the *Bridell case*, the statute of limitations commenced to run from the filing of Seijas' return in March 1946.

The instruction given in the case at bar that the statute of limitations began to run from the date of the filing of the false return in March 1946 was correct, especially so, because it was coupled with the further instruction that the prosecution would not be barred if the Jury found that the subsidiary conspiracy, as therein described, was entered into.

The Government approaches this contention with the statement (Br. 21) that both parties here agree that the "Grunewald theory" has no place in this case. This is an erroneous statement. The instructions on the application of the statute of limitations were drawn and requested by Petitioner in accordance with the principles laid down in the *Grunewald case*. The only contention made by the Petitioner was that the case should not have been submitted to the Jury at all. He did not contend that the instructions, as given, was improper.

The Government did not seek submission of the case to the Jury upon the so-called *Beacon Brass* theory by any request for an instruction embodying that theory. It did not, in the Court of Appeals, assert the so-called *Beacon Brass* theory in its brief or oral argument. The case was not even mentioned therein. It was referred to for the first time, in the Government's petition for rehearing (new trial).

At the time that the Government's Brief in the Court of Appeals was written, this Court had already decided the *Grunewald case*. The Decision is referred to and discussed in the brief. The principles applicable to the statute of limitations in conspiracy cases were

clearly established. Yet, in writing its brief, the Government did not attempt to avoid the application of the principles laid down in the *Grunewald* case and did not contend that the case was governed by the so-called *Beacon Brass* theory. The Government merely contended that the evidence was sufficient to sustain the conviction upon the theory on which the case was submitted to the Jury.

Indeed, the Government conceded in its petition for a new trial (attached as an Appendix to its brief in opposition to the petition for the writ of certiorari), that the instructions as given were proper. It said (p. 17 of said brief):

"It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above. As this Court (Court of Appeals) has pointed out, at the time this case was tried the Court of Appeals for the Second Circuit had recently held in *United States v. Grunewald*, 233 F. 2d 556, that the kind of 'subsidiary conspiracy' instructions given to the jury in the instant case were proper. Neither the trial judge nor the Government then had the advantage of the principles later established by the Supreme Court in reversing the conviction in *Grunewald*. Accordingly, the Government made no objection to the trial court's instructions."

The Decision of this Court in *Grunewald* lends no support to the Government's contention that a defendant can be tried in as many separate trials as the number of theories devised by the Government.

In *Grunewald*, this Court clearly established the principle that where acts of concealment are relied on to

prolong the operation of the statute of limitations in conspiracy cases, the evidence must establish that there was

"an express original agreement among the conspirators to *continue to act in concert* in order to cover up, for their own self protection, traces of the crime after its commission."

This was the principle embodied in the District Court's instruction to the Jury in what the Government describes as a "subsidiary conspiracy instruction" and was clearly proper under the decision of the Court of Appeals for the Second Circuit and of this Court in *Grunewald*.

Assuming that the record discloses that the acts of concealment were committed, there is not a shred of evidence that they were committed, pursuant to an antecedent conspiracy that they were to be committed.

Under the cases, cited in the former Brief, (pp. 51-2), evidence of the commission of certain acts of concealment do not constitute evidence of the existence of an antecedent agreement or conspiracy to commit the acts of concealment. The existence of a conspiracy cannot be inferred from the fact that certain acts were committed. That was clearly established in *Grunewald* and *Krulewitch*. What is lacking in the case at bar, is the evidence of the antecedent agreement or conspiracy to conceal or to commit acts of concealment.

V.

*Re: Comparison of Alleged Alternative Theory Urged
in the Case at Bar with the Alternative Theory
in the Grunewald Case.*

The Government argues (Br. 34-35) that the alternative theory in the case at bar and the *Grunewald* are parallel, that "in this aspect is thus indistinguishable" and that "petitioner is not more entitled to a judgment of acquittal here than were the defendant in *Grunewald*." The contention is without foundation:

(1) In *Grunewald*, the alternative theory was submitted to the Jury at the first trial. In the case at bar, the alleged alternative theory was not submitted to the Jury. That was the very basis of the Government's petition for a new trial.

The Court of Appeals based its Modification Opinion on the ground that the case "might have been tried upon this alternative theory." (R. 1937).

The Government now says (Br. 35) that it is equally true in the case at bar that the alternative theory was submitted. That is an incorrect statement. The Government admitted, in its petition for a new trial, that the alleged alternative theory was not submitted to the Jury. It said:

"It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above." (Referring to the alleged "alternative theory"). (Petition for Re-Hearing attached as Appendix of Brief in Opposition to Petition for a Writ of Certiorari, page 17).

(2) In the *Grunewald* case it was the defendant who assigned error in the instruction submitting the alternative theory and sought a new trial by reason thereof. Defendant took exception to the instruction in the District Court. (Record in *Grunewald* case, 752-753-757). The defendant had the right as appellant to assign the error and to seek a new trial by reason thereof.

In the case at bar, it is the Government that petitioned for a new trial, because the alternative theory had not been submitted.

The law does not give the Government the right to appeal or to assign error in a criminal case or to seek a new trial in a criminal case. The statutes governing appeals in criminal cases, the federal rules of criminal procedure governing applications for a new trial, and the Double Jeopardy Clause of the Fifth Amendment, all preclude the right of the Government in a criminal case to seek a new trial and, particularly so, when it acquiesced in the theory upon which the case was submitted to the Jury.

Petitioner erroneously stated in the former brief that the alternative theory in the *Grunewald* case was submitted on request of the defendant. This statement was an inadvertence. The record does not disclose at whose request the alternative theory was submitted to the Jury. It is immaterial, of course, at whose request the instruction was submitted. The important fact is that the theory was, in fact, submitted for consideration in the first trial. This Court reversed the decision of the Court of Appeals in the *Grunewald* case and remanded

for a new trial because of an error in the submission of the alternative theory in that it did not sufficiently distinguish the issues between the primary and alternative theory. Having reversed for error in the instruction, the only relief that could be granted was to remand for a new trial.

In *Grunewald*, the Court did not determine that there was a lack of evidence warranting submission of the case to the Jury on both theories. It determined that there was sufficient evidence warranting submission of both theories to the Jury. It only concluded that in giving the alternative instruction, the Court was not sufficiently specific.

VI.

Re: Power of the Court of Appeals on Petition for Re-Hearing.

The Government advances the contention (Br. 37) that the Court of Appeals has the power to entertain a petition for re-hearing when timely filed and upon such petition, may revise its decision.

Petitioner does not for a moment contend that the Court of Appeals could not entertain a true petition for re-hearing and, on such re-hearing, reverse its former determination of issues erroneously decided by it. Petitioner only claims that the Government's petition, although denominated petition for re-hearing, was not such, as a matter of law, but was, in legal effect, an original proceeding for a new trial under the record of this case.

The Government's petition did not ask that the Court of Appeals reverse its former determination that it was error to submit the case to the Jury on the instructions as given, which was the only issue decided by the Court. The Government did not seek reversal of the decision reversing the judgment of conviction. It only asked that the case be remanded for a new trial so that the alleged alternative theory could be submitted to the Jury.

That petition did not challenge any issue decided by the Court of Appeals in the Original Opinion. It merely presented the issue of the availability of the alleged alternative theory. The petition stated:

"It must be conceded that the case was not submitted to the jury in accordance with the theories outlined above."

The petition for a new trial was, in effect, the same as the application for a new trial so that the defendant could be tried on *newly discovered evidence* as in the *Sapir case*.

So far as the issue now before the Court is concerned, we see no difference between a petition to the Court of Appeals by the Government for a new trial on newly discovered evidence or to enable it to try defendant a second time on an alternative theory.

Petitioner only contends that under the record in this case, the Court of Appeals had no power to direct a new trial, *either in its Original Opinion, or on the alleged petition for re-hearing* which was, in legal effect, an original proceeding for a new trial.

The fact that the document was called a petition for re-hearing and that it was filed within the time allowed for filing such a petition, does not make it, in legal contemplation, a petition for re-hearing. The Court should construe the document for what it is in legal effect, under the circumstances of this case and so construed, it is merely an original application to the Court of Appeals for a new trial to enable the Government to try the defendant again on a theory other than that on which the case was sent to the Jury.

VII.

Re: Sufficiency of the Evidence to Establish Conspiracy "Continuing until January, 1952."

The Government argues (Br. 23 to 32) that there is sufficient evidence of conspiracy to evade Seijas' tax "which persisted at least until January 1952."

The prolongation of the statute of limitations period is predicated on the specific Overt Acts 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18). Whatever may be said as to the existence of evidence to establish the *commission* of those acts (we have demonstrated in the former Brief the lack of such evidence, pages 52 to 68), the important fact remains that there is no evidence that Seijas committed those acts *pursuant to antecedent agreement or conspiracy with Forman, Petitioner, that he should commit such acts*. Petitioner was on trial for conspiracy and not for the commission of substantive offenses.

The *Grunewald* and *Krulewitch* cases fixed the standards of proof necessary to establish such conspiracy. They were summarized in the statement that there

must be

"direct evidence . . . to show . . . an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection traces of the crime after its commission."

The evidence of such an agreement is lacking in the case at bar.

The Government does not point to evidence of such an agreement.

In *Grunewald* and *Krulewitch*, the Court held that acts of concealment of the same character as those described in the overt acts in the case at bar, do not establish the existence of the requisite *conspiracy to act in concert, etc.*

The acts, described in the overt acts, were merely acts of concealment of the attempted evasion *already committed* by Seijas by the filing of false returns. They were similar to the acts of concealment considered in the *Grunewald* and *Krulewitch* cases which were held to be insufficient to establish conspiracy to act in concert, etc. to accomplish the unlawful purpose.

The Court of Appeals decided that:

"The policy that blocked the theory stated in *Krulewitch* blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury."

The Court of Appeals did not depart from that conclusion in the Modification Opinion. It only held there was evidence in the record which would have warranted submission to the Jury of an alternative theory

had the Government requested instructions embodying such theory.

There is no conflict between the law as embodied in the instructions of the District Court as given and the decision in the *Beacon Brass* case. The *Beacon Brass* case was *not a conspiracy case*. It only established that the *substantive offense* of attempted evasion can be committed by certain acts of concealment. It did not deal with the question of *conspiracy to evade or the application of the statute of limitations* to such conspiracy.

The instruction that the conspiracy terminated in March 1946 does not stand alone. The Court instructed that the conspiracy would be terminated as of that date *unless there was an agreement to act in concert* of the kind described in *Krulewitch* and *Grunewald* and the Court of Appeals determined that there was no evidence of such an agreement. From this determination, the Court never departed.

The Government argues (p. 28) that the Jury could reasonably have found—under proper instructions—that the evasion conspiracy was still alive after November 19, 1947.

If that be true, then it was incumbent upon the Government to seek instructions submitting that theory to the Jury. It required additional instructions to submit such a theory. The fact that such a theory could have been submitted, does not establish that the theory upon which the case was submitted, was erroneous.

In any event, there is no evidence in the record to support the alleged alternative theory based on the overt acts numbered 24, 26, 29, 30, 31, 32 and 33. (R. 15 to 18).

The Government has, in effect, abandoned reliance on Acts 26 and 30 (Br. 29). It discusses only Acts 24 and 29, and 31, 32 and 33.

The abandonment of Act 26 also requires rejection of Act 29 because they are identical.

Act 26 relates to the tax years 1944 and 1945 and Act 29 relates to the year 1945 alone, otherwise, the allegations are identical as to date and all other respects.

Re: Act 24. Revenue Agent Clodfelter's Interview with Seijas on December 1, 1958.

The Government's Brief does not establish an interview between Clodfelter and Seijas on or about December 1, 1948. The Brief says:

"The record does not show the exact dates in 1948 on which Clodfelter talked to Petitioner and Seijas." (Br. 14).

It argues that Revenue Agents' reports are written up within a week or ten days of an interview and reference is made to pages 1327-1331-1332 and 1351 of the Record.

The testimony at these pages is not by the Revenue Agent Clodfelter. It was given by other Agents.

Revenue Agent Carlson had an interview in 1944. His report was dated November 4th, but he testified

that he called in Portland in August 1944 (R. 1331), indicating that his surmise that the interview was shortly before November 4th, was pure speculation.

The testimony at page 1351 of the Record is by the Agent Riedel. He rendered a report dated February 28, 1947. When questioned about the date of the interview, he was unable to give the date, but said it was "sometime prior to that. (Reporting). That is within the general time area." (R. 1351).

In any event the practice followed by these two Revenue Agents was not competent evidence to establish the date when Agent Clodfelter had an interview with Seijas. Clodfelter did not testify to any general practice as to the time between interview and report.

The question at issue is the application of the statute of limitations. Consequently, the burden is on the Government to fix the date of an act from which the statutory period is to run. It cannot be left to speculation or surmise. In a criminal case, the date has to be established beyond a reasonable doubt.

This is not a case where the interview on a given subject is admitted and the only issue is the date of the interview.

In this case, there is no evidence of any interview on or about December 1, 1951, in which the subject matter was "re-examination of the information returns" of the pin ball partnerships involving the alleged "hold-out" income or "operating" income for the purpose of ascertaining the "true receipts and income of such partnership" as alleged in Act 24. (R. 15).

The subject matter of the interview, and the only matter within the jurisdiction of Revenue Agent Clodfelter at the time, was the treatment of the sale of a capital asset as a long-term or short-term capital gain, depending upon the existence of a "covenant not to compete."

The specific charge in Act 24 is that Seijas submitted, to a Treasury Agent, false books, etc. which under-stated the true receipts of such partnerships at that particular date. The Government attempted to prove this charge by the testimony of Agent Clodfelter. But he testified that he did not examine any books of the partnership to determine "the true receipts and income of such partnerships." His interview related solely to a single item, to-wit, the treatment of the sale of a capital asset as a long-term or short-term capital gain by reason of an agreement not to compete. It had nothing whatsoever to do with the "true receipts and income of the partnerships."

He testified (R. 1343) that he did not examine the books in reference to the operating income. He made no inquiry in that respect. His report (Exhibit 42) shows that he *was not examining into the partnership returns. He was examining into Seijas' own individual returns.*

The report (Ex. 42, R. 1961) is on Seijas' own tax liability and not on the "information returns" of the partnerships as alleged in overt act 24. There is nothing in the report to indicate any examination into the operating income of the partnerships.

He did, in one of his interviews, examine three partnership returns, but they were not of the pin ball partnerships. They were three separate partnerships which operated theaters, a dock concession and real estate venture, none of which are involved in the case at bar.

He testified that he did not request all of the records of the pin ball partnerships (R. 1343) and that the purpose of the examination was "with respect to the agreement not to compete (R. 1346). He did not ask whether all of the revenue was reported (R. 1348). That was because his examination was limited to "that subject matter," referring to the capital gain transaction.

The sum and substance of his testimony and the report, Exhibits 41 and 42, are that on the date of the report, December 9, 1948, the object of his interview was solely the determination of the question of the treatment of the sale of the capital asset as a long-term or short-term capital gain. He was not investigating the revenue from the pin ball operations to determine whether or not there was any unreported income. He made no inquiries concerning any unreported income and did not examine any books or records in that connection because they were foreign to the subject matter of his investigation.

What is more important, is that there is not a scintilla of evidence by Clodfelter, or in the reports, that any representations were made to him that the books and records, which he did examine, contained a complete and truthful record of the "operating in-

come." He simply was not conducting an audit of the records covering operating income. He was not there for the purpose of ascertaining those facts and nothing was said to him by Seijas or Renstrom, his bookkeeper, that the books, which were submitted (not all), were an accurate record of the operating income.

Consequently, there is a total failure of proof of Overt Act number 24 in every essential particular.

The evidence does not establish that the alleged Overt Act 24 was in furtherance of a conspiracy to evade the tax by submission of false records as alleged therein.

Re: Overt Act 29

This act alleged that on September 1, 1948, *Petitioner concealed* from an officer of the Treasury Department,

"engaged in an official re-examination of *his* (not Seijas) and his wife's personal income tax returns for the year 1945 that during that year he received income from the aforementioned partnerships with . . . Seijas in addition to the amounts shown on the information returns" (R. 17).

We discussed this alleged act at page 54 of the former Brief. We there pointed out that there is no evidence in the record of any interview between Petitioner and any Revenue Agent on September 1, 1948. The Government's Brief does not point to any evidence establishing an interview between Petitioner and a Revenue Agent in which he concealed his income, or any interview on or about that date.

At page 30, in discussing overt act 29, the brief refers to page 14 and 15 of its Brief for evidence of that interview. Examination of pages 14 and 15 of the Government's Brief does not disclose any reference to any testimony establishing an interview between Forman and a Revenue Agent on or about September 1, 1948.

In the former Brief, page 54, Petitioner also contended that Overt Act 29 relates to an examination of *Petitioner's own tax return* and *not to Seijas' tax return* and, consequently, any false statement by Petitioner, if made, concerning *his own* tax liability, could not possibly be in furtherance of a conspiracy to evade Seijas' tax liability.

The Government meets this contention with the statement that

"The jury was entitled to infer, . . . that each of the conspirators was protecting the other in order to protect himself. . . ." (Br. 30).

No authority is cited for this unusual statement.

Forman did not make any statements as to Seijas' income at that interview.

According to the allegation, the Revenue Agent was examining into Forman's "personal income" and it is alleged that Forman concealed "his" income, not Seijas' income. His statements concerning his own income could not be evidence of an "attempt," or an overt act on his part, in *furtherance* of a conspiracy to evade Seijas' tax liability.

The relevancy of any statements that Forman may have made, true or false, must be determined by the

subject matter of the Treasury Agent's investigation at that time, especially where the indictment charges the hybrid offense of violation of Section 145(b) of the Internal Revenue Code and Section 1001 of the Criminal Code. (Paragraph D, Record 5).

Weinstock v. United States, 231 F. 2d 699
(Quotation at page 58, former Brief).

Re: Overt Act 30.

We shall not discuss Overt Act 30 because it has, in effect, been abandoned by the Government as heretofore pointed out.

Re: Overt Acts 31, 32 and 33.

These three Acts charge:

- (a) submission of a false net worth statement by Seijas on December 29, 1951, to Revenue Agents; and
- (b) the making of two false oral statements by Seijas to the Revenue Agents on January 11, 1952, when the net worth statement was being discussed.

These three Acts were discussed in the former Brief at pages 55 to 68.

It was there demonstrated that the net worth statement was submitted and the January 11, 1952, interview was held to discuss Seijas' tax liability for the tax years 1946 to 1948 and not the period 1942 to 1945. The subject matter within the jurisdiction of the Revenue Agents at that time was the tax liability for the 1946-1948 period and, consequently, any statements

that may have been made, true or false, could not be in furtherance of a conspiracy to evade Seijas' tax liability for the period 1942 to 1945.

The Government counters with the statement (Br. 30) that

"Petitioner, treating the three acts as one . . . , views the evidence in the light most unfavorable to the verdict"

There is an implication in this statement that there was an issue of fact about the subject matter of that interview. The Government does not point to any evidence to contradict the contention that the subject matter of the interview was not the 1946 to 1948 period.

Petitioner's contention, as it is developed in the former brief, is *predicated on the Government's testimony which it produced. It came from the Revenue Agents Oftedal and O'Leary, produced by the Government, and from the exhibits, to-wit, the net worth statement and accompanying letter and the Revenue Agent's reports.* The contention was not predicated upon contradictory evidence. The character of the testimony on which the Petitioner's contention was predicated is illustrated by the following:

Revenue Agent Oftedal described the interview (R. 1510) as

"a more general type discussion attempting to find out why there was a \$165,000 of unreported income in the three year period." (Referring to the 1946 to 1948 period shown in the statement).

Since the subject matter of the interview was Seijas' 1946 to 1948 income, any statement that may have been

made concerning the 1942 to 1945 income was purely incidental and not deceptive, and certainly not in furtherance of a conspiracy to evade Seijas' 1942 to 1945 tax liability.

CONCLUSION

In remanding for a new trial, the Court of Appeals ignored every well established rule applicable to the trial and review of criminal cases:

- (a) It undertook to review instructions given when the Government did not object or except thereto in the District Court in violation of Rule 30 of the Federal Rules of Criminal Procedure:
- (b) It reviewed the instructions given notwithstanding the fact that the Government, as Appellee, could not, as a matter of law, cross-appeal or assign error on Defendant's appeal, and could not appeal.
- (c) It ignored the rule that the instructions, as given and unexcepted to, become the law of the case, especially so in a criminal case.
- (d) It reviewed the availability of an alternative theory when the Government did not seek submission of such alternative theory by requesting an appropriate instruction embodying the alleged alternative theory. (Rule 30, F.R.C.P.).
- (d) It ignored the principle that in a criminal case the Government must *try the defendant in one trial on all available theories*. It cannot try the defendant on one available theory and when defeated, on appeal, seek to try him in a second trial upon another theory.
- (f) It ignored the rule that on appeal, the case must be reviewed upon the theory on which it was tried, as embodied in the instructions, and

the sufficiency of the evidence must be measured thereby.

- (g) It ignored the principle that the Government cannot, in a criminal case, seek a new trial.
- (h) It failed to recognize that the petition was, in legal effect, an original proceeding for a new trial on a different theory and NOT a petition for re-hearing.
- (i) It failed to recognize that reversal was based upon a determination that there was no evidence for submission to the Jury and not a reversal based upon errors infecting the trial.

The failure to give effect to these principles and rules resulted in a decision which, if allowed to stand, will deprive defendant of the protection of the Double Jeopardy Clause of the Fifth Amendment and would undermine, if not dissipate, the fundamental principles and policy established by the Court in the *Krulewitch* and *Grunewald* cases relating to the application of the statute of limitations in conspiracy cases and avoiding of the indefinite prolongation of the statute of limitations in such cases.

The record presents no apparent reason why it is "just" or "appropriate" that all of these principles and rules should be cast aside in order that the Government may have another go at this defendant.

Respectfully submitted,

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APPENDIX

United States v. Bridell, Opinion by Judge William J. Campbell in Case No. 58 C. R. 475, in the United States District Court for the Northern District of Illinois, Eastern Division, rendered November 20, 1958:

"Defendant has made a motion to dismiss this Count I of the indictment on the grounds that it was not found within six years next after the alleged offenses were committed;

However, it is the contention of the defendant that the offense charged in the indictment was completed on March 14, 1952, by the filing of a fraudulent income tax return and that, therefore, the complaint instituted before the Commissioner on June 13, 1958, was not within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 was not timely.

It is the contention of the Government that the offense charged is separate from the filing of the fraudulent income tax return, namely, the attempt to evade and defeat the taxes owing by the defendant by the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation *with the purpose of concealing additional unreported income* of the defendant. Since this act occurred on June 13, 1952, the complaint instituted on June 13, 1958 would be within the period limited by the statute of limitations and consequently the indict-

ment returned on July 31, 1958 would be timely.

A plain reading of the indictment clearly shows that the crime charged in Count I of the indictment is the attempt to evade and defeat the taxes owing by the defendant through the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing unreported income of the defendant.

Since this act took place on June 13, 1952, the question presented is whether this act is an offense separate from the filing of the fraudulent income tax return on March 14, 1952 under Title 26 U.S.C.

Defendant contends that the corporate return on June 13, 1952 was not a separate offense under Sec. 145(b) but was part and parcel of any offense which may have been committed by the defendant upon the filing of his individual tax return on March 14, 1952. In support of this contention, defendant cites *U. S. vs. Johnson*, 319 U. S. 503, 515; *Inholte v. U. S.*, 226 F. 2d, 585; *Cave v. U. S.*, 159 F. 2d 464; *Guzik v. U. S.*, 54 F. 2d 618.

The Government contends that the filing of the corporate return was a separate offense under Sec. 145(b) and cites *U. S. vs. Beacon Brass Inc.*, 344 U. S. 43 and *U. S. v. Sclafani*, 126 F. Supp. 654. The *Beacon* case involved an indictment returned against *Beacon Brass Co.* and its president on September 14, 1951, charging that both the defendants had attempted to evade taxes owing by making fraudulent statements to Treasury.

representatives on October 24, 1945, "for the purpose of concealing additional unreported income in violation of Section 145 (b)."

The unreported income apparently should have been included in the corporate return which was filed in January 1945, though no reference was made to such in the indictment.

The District Court dismissed the indictment on the grounds that it failed to charge an offense under Title 26 U.S.C. Section 145 (b) because such making of false statements could be punished only by Sec. 35 (a) (18 U.S.C.A., Sec. 1001) of the Criminal Code, since that section dealt specifically with false statements and the three year limitation of that statute had expired as to statements made in October, 1945. The Supreme Court in reversing the District Court made some statements which to me appear confusing. At Page 45, the Court states:

'The purpose to evade taxes is crucial under this section. The language of Sec. 145 (b) which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.'

Then at Pages 46 and 47, in the same opinion, the same Court states:

'The appellees contend that the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed. On the basis of this contention, appellees seek to sustain the decision below on the grounds that the six-year statute of limitations had run, and that the dismissal of the first indictment is *res adjudicata*

and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to review of the District Court's construction of the statute in the light of the facts alleged in the indictment.'

Then they cited *United States v. Borden Co.*, 308 U.S. 188.

Thus, the Supreme Court is stating on the one hand that false statements to Treasury Agents are offenses, under Sec. 145 (b) and then stating that *they are not deciding whether or not such statements are part and parcel of the one crime of tax evasion which was complete when the allegedly false tax return was filed.*

In the *Sclafani* case, Counts 4 and 5 of information charged that on or about and between June 21, 1950, and on January 12, 1951, the defendant, a married man, willfully and knowingly attempted to defeat and evade part of the income taxes due from him and his wife for the years 1945 and 1946, respectively, by making, filing and causing to be filed with representatives of the United States Treasury Department certain false and fraudulent statements for the purpose of concealing additional unreported income. The returns for the years in question were filed in March 1946 and March 1947, respectively, more than six years prior to the filing of the information, the limitation fixed by Title 26 U.S.C. Sec. 3748 (a), subdivision 2.

The Court denied the defendant's motion to dismiss stating at page 656:

'In support of his motion the defendant cites the cases of *Guzik v. United States*, 54 F. 2d, 618, *Cave*

v. *United States*, 159 F. 2d 464, and *United States v. Ehrlich*, 104 F. Supp. 223, contending that those cases are controlling since the crimes in said counts alleged were completed in March, 1946, and March, 1947. It is correct to say that prosecution for the alleged crime of attempted evasion of taxes by the filing of false tax returns was outlawed in 1954, but it was possible for the defendant to violate the statute involved in more than one way and on more than one occasion, and that is precisely what the Government accuses the defendant of doing. Counts 4 and 5 of the instant information charge that the defendant attempted to evade the payment of income taxes for the years 1945 and 1946, respectively, by filing or causing to be filed with representatives of the United States Treasury Department between June 21, 1950 and January 12, 1951, certain false and fraudulent statements for the purpose of concealing additional unreported net income for the years therein mentioned. The case of *United States v. Beacon Brass Co., Inc.*, 344 U. S. 43 appears to be in point. The pertinent facts in that case are substantially similar to those in the instant case.

Therefore, the *Beacon* case and *Sclafani* case relied upon by the Government here do not decide whether or not the defendant's act is, in the case at bar, a part and parcel of the offense of March 14, 1952 which was the filing of a fraudulent income tax return since the *Beacon* case expressly states that it is not deciding that question and the *Sclafani* case relies on the *Beacon* case as deciding that in a case of this nature two separate offenses are possible.

In my opinion the answer to this problem lies in the analysis of Sec. 145 (b), the section alleged to have been violated.

In *Spies v. United States*, 317 U.S. 492, the Supreme Court in discussing the difference between Sec. 145 (a) and Sect. 145 (b) made the following statement at pages 498, 499:

'The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading the tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest offenses against the revenues, Congress intended some willful commission in addition to the willful additions that make up the list of misdemeanors. *Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any manner or to defeat it by any means lifts the offense to the degree of felony.*'

It is clear to me from this language, and it has been held by many cases in addition to those cited by defendant, that it is the *same act* which is *aggravated* to the degree of a felony by such conduct which amounts to a 'willful and positive attempt to evade tax in any manner.'

I cite *U. S. vs. Hoover*, 233 F. 2d 870; *Elwert v. U. S.*, 231 F. 2d 928; *Hayes v. U. S.*, 227 F. 2d 540; *Canton v. U. S.*, 226 F. 2d 313; *U. S. v. Barden*, 224 F. 2d 255; *U. S. v. Smith*, 206 F. 2d, 905.

The act which constitutes the offense in the case at bar was the filing by the defendant of a joint income tax return on March 14, 1952 which was aggravated by the subsequent filing by the defendant as a corporate officer of a corporate income tax return on June 13, 1952.

Therefore, the act of the defendant in filing a corporate return on June 13, 1952 is not an offense separate from the offense completed in March 14, 1952 by the filing of his fraudulent income tax return. Therefore, Count I of the indictment, which charges the defendant with a violation of Sec. 145 (b) with reference to his own personal income tax return by such an act must fail.

It is illogical to presume that the true nature of the offense as set out in 145 (b) is contained in the defendant's act of filing a fraudulent corporate return since the evasion, per se, took place when the defendant filed his personal return. Such a construction as urged here by the Government would enable the Government to continue the statute of limitations indefinitely by using any false statement in regard to a past tax evasion as a reviving of the statute of limitations.

The motion to dismiss Count I of the indictment is for the reasons stated granted. And the same is dismissed."